

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of:

Implementation of the Local
Competition Provisions in the
Telecommunications Act of 1996

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CC Docket No. 96-98

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COMMENTS

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its affiliated domestic telephone
operating and wireless companies

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SUMMARY

The Commission's proposals to establish detailed federal standards regarding local competition are inconsistent with the language of the 1996 Act, its structure, and its deregulatory purpose. Rather than pursuing this legally perilous path, the Commission should identify ranges of sufficient but not mandatory outcomes to guide negotiations and PUC actions. This approach avoids the infirmities of national prescriptions and affords flexibility to accommodate local conditions while properly recognizing the contribution and expertise of state regulators.

The Commission should identify the following acceptable outcomes under section 251, without foreclosing other resolutions achieved by negotiating parties and/or approved by state PUCs:

-- *Good faith negotiations.* Both parties should be presumed to comply with § 251(c)(1) if negotiations are conducted pursuant to a good faith request process.

Parties may use non-disclosure agreements to protect competitively sensitive information.

-- *Interconnection.* Interconnection may occur at the end office, tandem, or a mutually acceptable meet point. The feasibility of other interconnection points should be determined upon reasonable request, after considering such factors as the effect on service quality and reliability as well as the availability of capacity and suitable technology.

-- *Collocation.* The 1992 *Expanded Interconnection* rules generally represent acceptable outcomes regarding the rights and obligations of incumbent LECs

and interconnecting parties. In addition, states may conclude that physical collocation should not be required at vaults on rights-of-way.

-- *Unbundled network elements.* Access to unbundled network elements should be dealt with through the good faith request process, keeping in mind that (1) network elements only include equipment, facilities, signalling and data bases actually used in the provision of a telecommunications service, (2) section 251(d)(2) establishes different standards for unbundling proprietary and non-proprietary network elements, (3) LECs must be allowed to recover the costs of unbundling from requesting parties, and (4) if a requested element is available from third parties, or if the requesting party could provide service without use of the ILEC network element, then unbundled access should not be required.

Further, for unbundled access to be technically feasible, (1) interconnection must take place using standard interfaces and protocols, (2) an ILEC must retain the ability to efficiently manage and maintain an unbundled element through network operating systems and (3) the service (or intended use) for which the interconnector wants access must be capable of coexisting with the services the ILEC provides to end users and to other interconnectors using the same element.

Against this background, access to unbundled loops, ports, transport links, and tandem switching, and access to incumbent LEC SS7 networks (and associated 800 and LIDB data bases) through the STP may be presumed technically feasible. Access to sub-loop elements raises complex technical, operational, and administrative concerns that effectively renders such unbundling infeasible. Unbundled access to the SCP and to AIN triggers currently is not technically feasible.

-- *Resale.* States must be able to prohibit resale of below-cost services, in order to preserve incentives for facilities-based competition and avoid compelling the ILEC's remaining ratepayers to subsidize competitive entry. Even if below-cost services were subject to resale under the 1996 Act, in no event should they be further discounted, because there are no true avoided costs and additional discounting would be uneconomic. States also should have the flexibility to permit reasonable limitations on resale designed to promote fair competition and avoid confiscation and stranded investment. In addition, wholesale rates should recover both joint and common costs and any new costs caused by making a service available for resale.

-- *Reciprocal compensation.* Parties may define their own local calling areas for compensation purposes and negotiate appropriately compensatory rates. They may also charge separately for transport and termination. Neither the FCC nor the states have authority to mandate bill and keep.

In addition to identifying these acceptable outcomes, the Commission must vigilantly guard the distinction between unbundled network elements and resold services in order to assure proper cost recovery and preserve incentives for facilities-based competition. To this end, requesting parties must not be permitted to avoid the resale pricing standard only by combining LEC-provided network elements to re-create retail services. Similarly, IXCs, in their capacity as IXCs, are not eligible to obtain unbundled network elements and must not be empowered to avoid access charges through this or any other mechanism. Sections 251 and 252 apply only to interconnection for purposes of local competition, and do not disturb the existing access charge rules.

The Commission also must not adopt or condone rules that would prevent incumbent LECs from recovering their joint and common costs. Proposals such as prices set at TSLRIC, a narrowly defined "imputation" rule that requires the sum of the prices for piece-parts to be less than or equal to the price of the bundled service, and transition pricing at short-run marginal cost would disable LECs from providing adequate service and amount to an unconstitutional takings. The 1996 Act is intended to advance the development of competitive markets based on the operation of free market forces. Accordingly, mandating rates that do not cover relevant costs and do not send the correct price signals to the market is prohibited. Competition founded upon irrationally low rates -- which in many instances are below cost -- is nonsensical and should not be allowed. In contrast, recovery of joint and common costs through Ramsey pricing or ECPR would be consistent with the 1996 Act. To minimize opportunities for uneconomic arbitrage and promote fair competition, the Commission should promptly reform the access charge rules and encourage re-balancing of intrastate rates in accord with underlying costs.

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COMMENTS

GTE Service Corporation ("GTE"), by its attorneys and on behalf of its affiliated domestic telephone operating and wireless companies, respectfully submits its comments in response to the above-captioned Notice of Proposed Rulemaking.¹ The Telecommunications Act of 1996 ("1996 Act") seeks to promote fair local competition in a deregulatory fashion, by allowing private parties to negotiate mutually acceptable interconnection agreements, subject to state review and FCC guidance. As discussed herein, the FCC should respect this balanced approach by identifying acceptable outcomes (or ranges of outcomes) for negotiations, while not foreclosing other results voluntarily reached by parties and/or approved by state regulators.

¹ FCC 96-182 (released April 19, 1996) ("NPRM").

I. MANDATORY NATIONAL STANDARDS WOULD BE INCONSISTENT WITH THE REQUIREMENTS AND GOALS OF THE TELECOMMUNICATIONS ACT OF 1996.²

The *NPRM* assumes that the FCC has the authority to establish detailed and explicit national standards for implementing § 251, and that doing so would serve the public interest. To this end, the *NPRM* asks over 400 questions focusing on the need for uniform *federal* regulations to govern interconnection, unbundling, resale, and pricing of services that are overwhelmingly *local*. Notably, the *NPRM* does not suggest that states are incapable of continuing to discharge their traditional regulatory oversight of intrastate communications. Nor does it offer even anecdotal evidence that Congress intended to create the "super agency" envisioned by the *NPRM*, which would sacrifice flexible negotiations and public utility commission (PUC) discretion on the altar of national uniformity. As discussed below, the approach in the *NPRM* is so flawed, in numerous critical respects, that its adoption would be inconsistent with congressional intent to "provide for a pro-competitive, *deregulatory* national policy framework"³

A. The 1996 Act Preserves the States' Primary Role in Regulating Local Competition.

The FCC is correct (¶¶ 37) that "sections 251 and 252 ... apply to both interstate and intrastate aspects of interconnection" relating to the offering of competitive exchange and exchange access services. It does not, follow, however, that the FCC

² This section of GTE's Comments responds to Part I.B of the *NPRM*, as well as those paragraphs elsewhere in the *NPRM* (including ¶¶ 47, 50, 57, 61, 63, 67, 73, 79, and 117) that propose adoption of national standards.

³ Conference Report No. 104-458, 104th Cong., 2d Sess., at 1 (emphasis added) ("Conf. Rpt.").

has direct and plenary authority to promulgate regulations setting forth binding interpretations of all the provisions in those sections.

The 1996 Act does not radically alter the longstanding jurisdictional balance between the FCC and state commissions set forth in § 2(b). Rather, it largely preserves that balance, by carefully apportioning responsibility for implementing the local competition provisions among private parties, state regulators, and -- in specifically delineated paragraphs -- the FCC. Thus, Congress envisioned and mandated a complementary rather than preemptory relationship.

Sections 251 and 252 apply in largest part to intrastate services and functions. Section 251(c)(2)(A) provides that interconnection shall be "for the transmission and routing of telephone exchange service and exchange access." As the House Report explained, this requirement is intended "to apply to LECs as competitors enter the *local* market and seek access to, and interconnection with, the incumbent's network facilities."⁴ Under § 2(b) of the Communications Act, the FCC has no direct authority to regulate the rates, terms, or conditions for these local services and functions unless (1) it is explicitly given jurisdiction to do so by Congress, or (2) the intrastate and interstate components are inseverable and state regulation would thwart or impede valid federal policies.⁵

⁴ H.R.Rep. No. 104-204, 104th Cong., 1st Sess. at 71 (emphasis added)("House Report").

⁵ *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 375 n.4 (1986). The *NPRM* does not suggest that the intrastate and interstate aspects of LEC services and functions provided under § 251 are inseverable, and such an assertion would have no merit in any event.

The 1996 Act does not authorize the FCC to displace state oversight of intrastate communications. Indeed, Congress's failure to modify § 2(b) to exclude §§ 251 and 252 (see ¶¶ 39-40) reflects the fact that §§ 251 and 252 give the FCC authority to regulate intrastate communications only as a backstop, with the exception of a handful of specific matters discussed below.⁶ In recent years, Congress has given the FCC authority over specific aspects of intrastate communications on several occasions, most notably in amending § 332 as part of the 1993 Omnibus Budget Reconciliation Act. On each of those occasions, Congress has likewise amended § 2(b) to carve out the new grant of authority. Not doing so here is powerful evidence that Congress intended to retain the states' primary role in regulating intrastate communications.

The FCC's contrary interpretation -- that Congress saw no need to amend 2(b) because 251 and 252 address intrastate communications and were adopted after 2(b) - flouts a cardinal principle of statutory construction. It is well-established that repeal by implication is disfavored:

[T]he legislature is presumed to envision the whole body of the law when it enacts new legislation. Therefore, the drafters should expressly designate the offending provisions rather than leave the repeal to arise by implication from the later enactment.⁷

This principle of construction holds particularly true with respect to the Communications Act. As the Supreme Court explained in *Louisiana PSC* (where it held that the FCC's power over depreciation rates under § 220 was limited to interstate

⁶ See page 7, *infra*.

⁷ N. Singer, 1A SUTHERLAND STATUTORY CONSTRUCTION § 23.10, at 353 (1993); see *Radzanower v. Touche Ross and Co.*, 426 U.S. 148, 154 (1976).

services), statutory provisions do not give the FCC authority over intrastate services unless they are "so unambiguous or straightforward as to override the command of § 152(b)"⁸ Nothing in §§ 251 and 252 indicates that Congress intended such an unambiguous override.⁹

Adoption of detailed federal rules would also be inconsistent with the explicit structure of §§ 251 and 252, which assign discrete roles to the parties negotiating agreements, state regulators, and the FCC. Specifically, under § 252(a)(1), an incumbent LEC ("ILEC") must negotiate an interconnection agreement with a requesting telecommunications carrier in good faith.¹⁰ The parties may enter an agreement "without regard to the standards set forth" in § 251(b) and (c). § 252(a)(1). A voluntary agreement must be submitted to the state PUC to review, but the scope of review is narrow: under § 252(e)(2)(A), such an agreement may be rejected only if it discriminates against another telecommunications carrier or is not consistent with the public interest. Importantly, there is no indication in the statute or the legislative history that detailed national rules are needed to guard against the FCC's perceived mismatch

⁸ *Louisiana PSC*, 476 U.S. at 377; *see also Independent Community Bankers Ass'n of South Dakota v. Board of Governors*, 820 F.2d 428, 438 (D.C. Cir. 1987) ("courts will not find repeals by implication unless legislative intent to repeal is 'clear and manifest.'").

⁹ The *NPRM* attempts to distinguish the new Act, where Congress did not amend 2(b), from § 332, where Congress did, by arguing that amendment was necessary in the latter instance because 332 affected end user rates (§ 40.) The Supreme Court, however, has already rejected the argument that § 2(b) applies only to end user charges. *Louisiana PSC*, 476 U.S. at 372-73. Section 2(b) does not distinguish between wholesale and retail services -- it only differentiates interstate and intrastate services.

¹⁰ Notably, under §251(c)(1), the requesting carrier also must negotiate in good faith.

of bargaining power (see ¶ 31). Rather, the terms of the statute establish ground rules that guide, but do not compel, the outcome of private negotiations.

States play a greater role in the negotiation process where the parties cannot voluntarily agree. Upon request, states may mediate disputes. If differences remain after 135 days, states may arbitrate pursuant to procedural and substantive standards set forth in the statute. In that role, states may impose terms meeting the requirements of § 251, set rates that comply with the pricing standards in § 252(d), and establish an implementation schedule.¹¹

The FCC's position in the process is similarly well-defined. Under § 251(d), within six months after enactment the FCC must "complete all actions *necessary* to establish regulations to implement the requirements of this section." (Emphasis added.) Use of the qualifier "necessary" suggests that this directive must be read in light of the specific mandates for FCC action in other subsections of 251. Subsection (b)(2), for example, directs the FCC to prescribe rules governing number portability, and subsection (d)(2) requires the agency to determine which unbundled network elements should be made available at technically feasible points, after giving due consideration to proprietary interests and other factors. Subsection (e)(1) gives the FCC "exclusive jurisdiction over access to telephone numbers until numbering administration guidelines

¹¹ States also have authority under the statute to prohibit resale of telecommunications services available to a category of subscribers to other categories of subscribers, § 251(c)(4)(B), and to exempt rural LECs from § 251 requirements, § 251(f)(1). States may also suspend or modify the § 251(b) and (c) requirements for ILECs with fewer than two percent of aggregate nationwide lines. § 251(f)(2). In addition, states may establish and enforce other access and interconnection requirements that are consistent with § 251. § 251(d)(3).

are issued,"¹² and subsection (h) instructs the FCC to define "incumbent LECs." Finally, under § 252(e)(5), the FCC can step into the negotiation process if, and only if, the state fails to perform its duties. Against this background, the terms and conditions of interconnection clearly should be determined in the first instance by the negotiating parties, not dictated by FCC rules.

B. A One-Size-Fits-All Approach Is Untenable and Unwise.

The FCC assumes, without articulating any factual basis, that detailed national standards are essential to promoting local competition (§§ 28-32). This assumption is fundamentally flawed. As an initial matter, the *NPRM* fails to recognize that the services and networks at issue here are local, not regional or national. Although the FCC suggests that new entrants would gain certain efficiencies by being able to "configure their networks in the same manner in every market they seek to enter" (§ 30), this is sheer speculation.

In reality, each local market is different -- some are flat, others are hilly or mountainous; some are densely populated, others are suburban or rural; some have state-of-the-art technology, others retain older facilities; some possess a temperate climate, others suffer harsh storms; some are wealthy, others are poor; some have a

¹² Notably, however, the FCC may delegate this responsibility to the states.

high proportion of business customers, others are predominantly residential.¹³ The combination of these variables means that there is no uniform entry strategy that can possibly make sense for all competitors in all areas of the country. Rather, a single entrant is likely to pursue different strategies in different markets -- and rules that dictate uniformity will disserve new entrants and incumbents alike.

In addition, many of the proposed areas for uniformity, such as nationwide guidelines for installation, maintenance and repair of interconnection facilities (§ 61), and provisioning and service intervals for unbundled network elements (§ 79), are untenable, given significant variations among the resources and networks of ILECs (see § 33). The RBOCs, at least, are offspring of a single system, and accordingly share many (though not all) of the same operational support, billing, order-taking, and repair systems. GTE, in contrast, has acquired numerous operating companies from other independents, and has undertaken the enormous task of creating unified, GTE-specific operational systems for all of its service territories. These systems are different

¹³ Many of these variations are illustrated by the profound differences between territories served by GTE and the RBOCs. For example, the BOCs in the aggregate serve 130 telephones per square mile; GTE serves fewer than half that number. Each RBOC has more access lines per square mile than GTE, by a factor of 1.5 to 7.2. The average RBOC end office is 3 times larger than the average GTE end office. BOC fiber cables have an average cross-section three times that of GTE. The average number of business establishments served by the BOCs ranges from 1.5 to 5.7 times the number served by GTE. See *generally* Comments of GTE, CC Docket No. 92-256, (GTE D. 92-256 Comments) filed Feb. 22, 1993, at 17-28 and Attachment H; GTE Petition for Waiver of Part 69, filed Nov. 27, 1995, at 21-23. Each of these factors affects entry strategies for prospective competitors.

in many respects from those used by the RBOCs, even though they accomplish the same basic tasks.¹⁴

The FCC also must recognize that variations in market characteristics would foreclose viable uniform national standards even if technology and operating systems were identical. For example, in urban areas an ILEC might be able to provide repair services within two hours because it has sufficient population density to justify service locations close to most of its customers. ILECs in less densely populated territories are likely to have maintenance and repair operations farther from their customers, so that any problem that cannot be addressed remotely will of necessity take longer to fix. The same holds true for installation of facilities; ILECs in urban exchanges may be able to deploy within a few days what would take an ILEC in suburban or rural exchanges a week or more. These variations would render any national standard for maintenance, repair, and installation intervals too lax for some carriers and too stringent for others. What matters is that each carrier provide such services to itself and its competitors on a non-discriminatory basis -- not that each carrier meet the same standards across the nation.

A one-size-fits-all approach also precludes potentially significant benefits from experimentation and diversity of outcomes based upon local conditions. Negotiating parties, given adequate flexibility, can be expected to implement a variety of interconnection arrangements that uniquely advantage consumers in particular locations. The FCC should not presume that there is a single, easily divined, "right"

¹⁴ See GTE D. 92-256 Comments, *supra* note 13, at Attachment F (describing the disparate operational systems then in place).

outcome. Adoption of mandatory federal standards would likely foreclose the development of mutually beneficial arrangements that can not be anticipated by regulators yet serve the public interest.

C. Mandatory National Standards Would Improperly Ignore the Substantial Work and Expertise of State Regulators.

The *NPRM* acknowledges that several states have already devoted tremendous effort to fashioning local competition rules. Nonetheless, it proposes an approach that would, at best, declare one state's rules (or a cherry-picked amalgamation) as the standard for all fifty and relegate state PUCs to performing ministerial functions. This lack of deference is both unwise and wasteful. The states as a whole are committed to competition, as is the FCC. Moreover, they are far closer to the needs of consumers, and indisputably are better equipped to assure that the transition to local competition occurs in a rational manner that respects and accommodates varying local circumstances.

Deference to the states is particularly warranted because PUCs generally develop rules using procedures that allow for comprehensive fact-finding based upon local conditions. They afford parties an opportunity to provide oral and written expert testimony and to cross-examine opposing experts. They also frequently utilize informal procedures, such as workshops, that enable parties to attempt to work out their differences under the aegis of the PUC. These methods maximize the likelihood that rules will accord with economic and technological realities.

Admittedly, there are some variations among the approaches taken by the states. Nonetheless, there is also considerable commonality regarding such important matters as points of interconnection, degree of unbundling, removal of restrictions on

resale, and the right to mutual compensation. Moreover, the *NPRM* presents no basis for concluding that differences among the states are deleterious rather than beneficial to competition. As Chairman Hundt has realized, just the opposite is true:

I am well aware that the states are laboratories for democracy, and for communications deregulation. . . . You'd know as much about local exchange issues as anyone -- a lot more than many of us at the FCC.¹⁵

D. Enforcement of Mandatory Federal Rules Would Overwhelm the FCC's Resources.

By adopting detailed federal rules for interconnection, the FCC would be centralizing in federal hands a process that Congress clearly intended to involve negotiations and an important state role. By doing so, the FCC would be opening the doors to a flood of filings and enforcement requests that would swamp its limited resources and paralyze its processes. It would face countless petitions for declaratory ruling, since states would effectively be precluded from setting policy or interpreting FCC rules. It would be asked to reconsider every last detail of the rules and of any changes made during the reconsideration process. It would be inundated with formal and informal complaints stemming from every dispute between ILECs and competitive LECs ("CLECs") anywhere in the country. And, it would be besieged by requests for staff mediation, as well as phone calls and letters asking for informal guidance. In an era of tight regulatory budgets, taking on such a burden would be unmanageable and unwise.

¹⁵ Speech by Reed Hundt to NARUC, Feb. 27, 1996, 1996 FCC Lexis 1016 at *2-*3. See also H.R. Rpt. No. 560, 103d Cong. 2d Sess at 58 (1994) (referring to Justice Brandeis's dissenting opinion in *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932).)

E. The Risk of Unrealistic and Impractical National Standards Is Extremely High.

The FCC must address a tremendous number of highly complex issues by August 8. It simply does not have the time or resources to consider all of the legal, factual, and policy points that will be raised in the record. Consequently, the greater the level of detailed prescriptions and sweeping preemptions, the greater the potential for serious mistakes that will plague the industry, consumers, and the FCC for years to come. Given this risk, prudence suggests that the FCC should provide overall guidance rather than impose detailed requirements, thereby giving private parties and states the flexibility to adopt solutions that differ from those the FCC initially considers acceptable.

II. THE ACT'S GOALS CAN BEST BE ACHIEVED IF THE FCC PROVIDES GUIDANCE FOR NEGOTIATIONS AND PUC ACTIONS BY IDENTIFYING A RANGE OF SUFFICIENT BUT NOT NECESSARY OUTCOMES.¹⁶

There is an alternative to detailed federal standards that better comports with the 1996 Act's emphasis on deregulation, yet still achieves the FCC's legitimate objectives. Specifically, the FCC should identify outcomes that it believes are sufficient to comply with the 1996 Act, without foreclosing private parties and states from implementing different, but equally acceptable, arrangements. As discussed below, this approach has several advantages.

Achieving the FCC's legitimate objectives of promoting certainty and expediting the development of local competition. Identification of a range of acceptable outcomes would provide guidance to states in arbitrating and reviewing agreements and to parties

¹⁶ This section of GTE's Comments responds to Part I.B of the *NPRM*, as well as those paragraphs elsewhere in the *NPRM* (including ¶¶ 47, 50, 57, 61, 63, 67, 73, 79, and 117) that propose adoption of national standards.

concerned with the § 271 process. In addition, FCC guidelines would supply benchmarks for each party to use in evaluating the other's position in the course of negotiations. Informing ILECs and new entrants about acceptable but not necessary outcomes will enable them to reduce their transaction costs by diminishing posturing, and will speed the resolution of fair and balanced agreements. Risk-averse entities, or those unsure about the benefits of departing from the guidelines, would almost certainly adhere to them. Other parties might reach different arrangements that produce palpable efficiency gains. The opportunity to do so should not be foreclosed, as would happen with mandatory federal standards.

Avoiding legal infirmities by preserving jurisdictional boundaries and honoring the 1996 Act's emphasis on deregulation, private negotiations, and state oversight.

Guidelines would be likely to direct the states in directions desired by the FCC, but would not violate §§ 2(b), 251, and 252 by compelling them to take a certain path. In addition, as Congress intended, guidelines would permit negotiating parties to define the terms of their relationship and maintain a meaningful oversight role for the states.

Recognizing the contribution and expertise of state PUCs. The extensive work already done by many PUCs would be respected, and states would not be relegated to ministerial implementation of the FCC's directions. Moreover, the federal-state relationship would be complementary, with each jurisdiction having a chance to learn from the other's experience.

Consistency with the realities of the FCC's limited resources. Instead of trying to manage every last detail of the transition to local competition, the FCC could provide

continuing guidance while being freed to concentrate scarce resources on implementing those provisions of the 1996 Act for which it bears specific responsibility.

Allowing for correction of mistakes before they adversely affect competition and consumers. To the extent the outcomes identified as acceptable are consistent with technological and economic realities, they will likely be incorporated into private agreements and state rules. To the extent they are impractical or undesirable in the marketplace, they will be disregarded, avoiding harm to the public interest.

In recent years, the FCC has recognized the value of identifying adequate but not mandatory outcomes in a wide variety of contexts. For example, in seeking to increase channel reuse when revising the rules governing Private Land Mobile Radio Services, the FCC recognized the need to afford licensees "the flexibility they need to design their individual systems."¹⁷ Taking account of the differences among entities serving small areas, those needing larger systems, and entities operating "ribbon systems" (such as railroads), the FCC adopted an acceptable outcomes approach for the 150-174 and 450-470 MHz bands. In addition, just last month, the FCC adopted interim policies governing cable operators. The FCC's goal was to assure such operators that "if they comply with these interim rules, their behavior will not later be subject to challenge based on the ultimate outcome of the proceeding."¹⁸ This

¹⁷ *Matter of Replacement of Part 90 by Part 88 to Revise the Private Land Mobile Radio Services and Modify the Policies Governing Them and Examination of Exclusivity and Frequency Assignment Policies of the Private Land Mobile Radio Services*, 10 FCC Rcd 10076, 10112 (1995).

¹⁸ *Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, FCC 96-154, CS Dkt. No. 96-85, at ¶ 4 (April 9, 1996).

approach thus gave cable operators an incentive to comply with its interim rules, but did not foreclose the opportunity of a cable operator to make the case that an alternative policy better served the public interest.¹⁹

III. THE FCC SHOULD ADOPT GUIDELINES FOR ACCEPTABLE OUTCOMES CONSISTENT WITH THE FOLLOWING SUGGESTIONS.

As discussed above, FCC identification of *per se* reasonable outcomes that do not preclude other arrangements would be consonant with the 1996 Act's language and goals, and would best serve the public interest. This section of GTE's comments suggests outcomes that the FCC should find acceptable with respect to good faith negotiations, interconnection, collocation, unbundling, resale, and reciprocal compensation.

A. Good Faith Negotiations.²⁰

The FCC should recognize that the duty to negotiate in good faith must extend to requesting parties and incumbents in equal measure.²¹ Accordingly, in its guidelines implementing § 251(c)(1), the FCC should presume that the mutual good faith obligation is satisfied if negotiations are conducted pursuant to a *bona fide* request

¹⁹ This approach has met with marked success in other areas of the law as well. To illustrate, the 1992 Department of Justice and Federal Trade Commission Horizontal Merger Guidelines provide notice of mergers that the DOJ and FTC are unlikely to challenge, while still giving entities the chance to show that a proposed merger outside the guidelines is consistent with the public interest in competition. See Merger Guidelines, 57 *Fed. Reg.* 41,552 (Sept. 10, 1992).

²⁰ This section of GTE's Comments responds to Part II.B.1 of the *NPRM*.

²¹ See §§ 251(c)(1), 252(b)(5).

process.²² Such a process would be especially beneficial because certain terms used in the statute -- e.g., "technically feasible point" -- are imprecise, and will inevitably trigger disagreements.

To help promote productive negotiations, the process should require that the initial request include a certification by the requesting party that it will use the requested interconnection, unbundled element, or resold service to furnish competitive exchange or exchange access service, as is required by the 1996 Act.²³ To permit a fully informed response, the request should reasonably describe the desired functionality or service, and advise the ILEC when the requesting party will be able to use it (e.g., when it will obtain any permits or licenses needed to obtain access to the requested point). In addition, the process should establish a time frame in which the ILEC would be required to: (1) request additional information, if needed, (2) inform the CLEC of the costs associated with the request, and (3) begin providing the requested service or features. The process also should allow the ILEC to take appropriate steps to assure that it recovers its costs of processing the request and providing the requested interconnection, service, or element.²⁴

²² In this regard, some lessons can be learned from the Open Network Architecture basic service element request process. *See Filing and Review of Open Network Architecture Plans*, 5 FCC Rcd 3103, 3117 (1990)

²³ As discussed in section V, *infra*, IXCs are not entitled to obtain interconnection under § 251 in their capacity as IXCs.

²⁴ As explained in section III.D.2 *infra*, the legislative history makes clear that economic reasonableness is part of the good faith negotiation process, and that requesting parties must pay for the costs of interconnection and unbundling.

Beyond this, the FCC should not prohibit the use of nondisclosure agreements (§ 47). Non-disclosure agreements can be beneficial to the negotiation process because they encourage parties to be open, candid, and willing to compromise. They can cover such information as traffic volumes forecasted to flow through various points of interconnection and network migration plans that impact future network design. Further, because the terms and conditions of the final agreement will be publicly disclosed and available, constraints that would hinder the exchange of sensitive information are unnecessary to ensure that similarly situated new entrants are treated fairly.²⁵

GTE further notes that IXC's, including AT&T and MCI, routinely insist on nondisclosure agreements when negotiating with customers and resellers. They should certainly be willing to enter such agreements when acting as CLECs. Indeed, GTE's recent experience is that some new entrants want GTE to enter nondisclosure agreements. Although GTE does not insist upon such agreements as a condition for negotiation, it is willing to enter into them to protect sensitive information.

B. Interconnection.²⁶

Interconnection vs. Transport and Termination. The *NPRM* asks commentors to distinguish interconnection from the transport and termination of telecommunications (§ 53). As commonly understood, the term "interconnection" denotes links between an ILEC's network and a competitive LEC's network, such as trunks that connect the two

²⁵ See §§ 251(h), (i).

²⁶ This section of GTE's Comments responds to Part II.B.2.a of the *NPRM*.